United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1422

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To be argued by
IRA H. BLOCK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1422

UNITED STATES OF AMERICA,
Appellee,

—v.—

WALTER SWIDERSKI and
MARITZA DE LOS SANTOS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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1976

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Preliminary Statement

Walter Swiderski and Maritza De Los Santos appeal from judgments of conviction entered on December 8, 1975 in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Dudley B. Bonsal and a jury.

Indictment 75 Cr. 797, filed on August 8, 1975, contained two counts charging each appellant with possessing with intent to distribute 21.5 grams of cocaine (Count One) and 7.6 grams of marijuana (Count Two), and aiding and abetting the same in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.

Trial commenced on October 21, 1975. Count Two was dismissed as against Walter Swiderski at the con-

clusion of the evidence on October 23, 1975. The jury found Swiderski guilty of possession of cocaine with intent to distribute (Count One) and De Los Santos guilty of possession of cocaine and marijuana with intent to distribute each (Counts One and Two). On December 8, 1975, Swiderski and De Los Santos were sentenced pursuant to 18 U.S.C. § 3651 to two-year terms of imprisonment, six months to be served in a jail-type institution, execution of the balance suspended, with concurrent three-year terms of probation and special parole following release from confinement. On that same date, Judge Bonsal set aside De Los Santos' conviction on the marijuana count.

Statement of Facts

The Government's Case

Martin Davis

In late summer of 1973, believing that the authorities were aware of prior marijuana sales by him, Martin Charles Davis, an unemployed 27 year old student, contacted the New York City Police Department in order to clear his record with respect to these sales before new and stricter New York drug laws took effect. (Tr. 24-25).* As a result of this inquiry, Davis was interviewed by a Sergeant Egan who offered him the opportunity of cooperating with the Police Department. This offer was declined. (Tr. 26-27). Thereafter, Davis was introduced to Special Agents Joseph Keefe and Thomas Fekete of the Drug Enforcement Administration New York Joint

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* "Tr." refers to the transcript of the trial; "GX" refers to the Government's exhibits at trial; "Swid. Br." refers to appellant Swiderski's brief; "Santos Br." refers to appellant De Los Santos' brief; "App." refers to appellant Swiderski's appendix.

Task Force and agreed to cooperate with the Task Force. Under the terms of his arrangement with DEA, Davis was to receive $150 for an introduction to a narcotics violator which led to an undercover purchase of an ounce or more of hard drugs, either cocaine or heroin. (Tr. 28-29; 80-81). During the year and a half of his cooperation with the Task Force, Davis received approximately $16,000, of which $9,000 or $10,000 was for his own use. (Tr. 29).

Davis testified that in the fall of 1972 he joined a corporation known as Solid State Light, Inc. at 82 West 3rd Street in Manhattan which used lights and music for entertainment purposes. (Tr. 36-37). In November or December of 1973, a fellow employee at the light show, Jeffery Cawl, introduced Davis to Walter Swiderski. (Tr. 40). Davis testified that at this meeting Swiderski mentioned he was selling tetrahydracannabinol ("THC"), indicated to Davis that he had a large quantity of it for sale and solicited Davis' assistance in finding purchasers. Swiderski asked Davis not to tell Cawl about these developments because Cawl would want a commission. (Tr. 41). Davis also offered to introduce Swiderski to prospective buyers of drug substances which Swiderski might have for sale. (Tr. 95). During the next year and a half Davis and Swiderski spoke several times about the possibility of dealing in narcotics. (Tr. 41).

On May 31, 1975 Davis received a telephone call from Swiderski during which Swiderski said he wanted to buy "a quarter of cocaine" and asked for an in person meeting with Davis that evening. Davis at first thought that Swiderski meant a quarter of an *ounce* of cocaine. However, when Swiderski came later that evening to Davis' room at the Chelsea Hotel he made it plain he was in the market for a quarter of a *pound* of cocaine at a price of $3,000 to $4,000. To demonstrate the seriousness of his interest and to prove his ability to pay,

Swiderski flashed a large amount of cash. (Tr. 42-43). Other drug dealers present in Davis' room during the meeting offered Swiderski substitute narcotics such as speed, but Swiderski was adamant in the specificity of his order, emphasizing that "the only thing he wanted was the cocaine." (Tr. 43). Davis called Special Agent Fekete the next day and was instructed to stall until Fekete could consult with others at the Task Force. Shortly thereafter Fekete authorized Davis to proceed and through an intermediary Davis located a willing but cautious supplier for the cocaine—Carlton Bush. (Tr. 44-46).

On June 2, 1975, Davis again spoke with Swiderski on the phone and was told the transaction must be completed as soon as possible, that Swiderski had other cocaine connections and that Swiderski would go to them if the sale was not shortly accomplished. Swiderski and Davis agreed to met at Davis' hotel room the next day—June 3rd—and from there they would go to Davis' connection. It was also agreed that Swiderski would pay $4600 for the four ounces of cocaine. (Tr. 47-48).

At about three o'clock in the afternoon on June 3, Swiderski and his fiancee, the defendant De Los Santos, arrived at Davis' hotel room. Davis was shown a stack of bills about two inches thick by his visitors. (Tr. 48-50). Then Davis, De Los Santos, Swiderski and someone named "William" drove in Swiderski's van from Davis' apartment to 58 West 48th Street where they entered a small studio-like apartment. Carlton Bush was already there. (Tr. 50-51). After entering the apartment, Swiderski, Davis and Bush went to a bedroom area where Bush produced a package of white powder and discussed price with Swiderski. (Tr. 51-52). Swiderski summoned De Los Santos to the bedroom area where they snorted the cocaine and conducted burn and bleach tests to determine the cocaine's quality. (Tr. 52-

54). When Swiderski asked De Los Santos "What do you think, should we buy it?" she replied that although the cocaine wasn't good enough for their personal use, they had a buyer ready and could sell all that Bush could come up with in the future. (Tr. 54). After Swiderski and De Los Santos indicated that they wanted higher quality and a better price on their next purchase, Swiderski said "All right, we will do it." (Tr. 54). Bush told them they could buy one ounce then and come back for the remaining three ounces later that evening, whereupon Swiderski counted out $1,250 (which was double-checked by De Los Santos), gave it to Bush and took possession of the ounce of cocaine. (Tr. 54-55; 57-58). Swiderski and Bush then spoke briefly; Swiderski remarked that he wanted "a reliable and heavy coke connection" and that within a few days he would be able to do another half-pound. (Tr. 55). He also indicated he might be able to purchase at the rate of about a pound a week in the future. It was agreed they would meet again at the apartment at 6 P.M. to complete the deal. (Tr. 55).

Following the transaction, Swiderski and De Los Santos drove Davis back to the Chelsea Hotel. (Tr. 59). After he left their van Davis met with Special Agent Fekete and told him what had occurred in the apartment. (Tr. 59).

On cross-examination by Swiderski's counsel Davis testified that he had no recollection of ever offering to sell Swiderski drugs although he may have offered to introduce Swiderski to someone who would sell him drugs. (Tr. 92-95). Davis admitted he had held himself out to Swiderski as a drug dealer but explained that the conditions which Davis set for drug sales by him were so onerous that it was impossible for such transactions actually to occur. (Tr. 95). Indeed, Davis testified that he did not share in the proceeds of the June 3 sale. (Tr.

100). On cross-examination by counsel for De Los Santos Davis acknowledged that he had no narcotics-related conversations with Ms. De Los Santos prior to June 3, 1975. (Tr. 129-30).

Police Officers Lino and Lamirata

Police Officer Lino explained that he had been alerted by Special Agent Fekete to expect a narcotics transaction and, in anticipation thereof, conducted surveillance in the vicinity of the Hotel Chelsea on the afternoon of June 3. (Tr. 134-35). On that day he observed a blue van parked outside the Hotel Chelsea and saw Swiderski, De Los Santos, Davis and another man enter the van and travel north to 48th Street. (Tr. 134-35).

Upon arrival at 55 West 48th Street, these individuals left the van and entered premises at that address. They remained inside for about 40 minutes. Davis, Swiderski and De Los Santos then exited the premises, re-entered the van and returned to the Chelsea where Davis got out. (Tr. 136). Swiderski and De Los Santos then drove north on 8th Avenue to the intersection of 34th Street and 8th Avenue where Lino pulled his car in front of the van and fellow officers blocked the van's retreat with their vehicle. (Tr. 136-37). Lino and his partner, Lamirata, left their car and identified themselves as police officers. Swiderski jockied the van from forward to reverse and back again, crashing several times into the DEA vehicles in his attempt to flee. (Tr. 137-38). Pictures of the damage sustained by the DEA automobiles were introduced into evidence as GX 9, 10, 12 and 13. (Tr. 144-46; 179-81).

Swiderski and De Los Santos were placed under arrest. Ms. De Los Santos' purse contained a quantity of cocaine in a pouch, a vial of marijuana, and $3700

in cash. Approximately $600 in cash was seized from Swiderski. (Tr. 139-40).

Police Officer Lamirata's testimony paralleled and corroborated that of his partner in all material respects. (Tr. 177-82). In addition, the Government presented the testimony of DEA chemist Frederick Martorell that the substances found in Ms. De Los Santos' purse were cocaine and marijuana. (Tr. 61-74).

The Defense Case

Walter Swiderski

Walter Swiderski testified he was a 29 year old high school graduate with several semesters at Rutgers and Fairleigh Dickinson Universities. At the time of trial and during the events in question, he was living with his co-defendant and fiancee, Maritza De Los Santos. (Tr. 195-96). Swiderski first met Marty Davis in November, 1973 when Swiderski became interested in experimenting with marijuana as a result of newspaper articles he had read. (Tr. 198-99). From November, 1973 until June 3, 1975, Swiderski met with Davis between 20 and 25 times, notwithstanding Davis' habit of telling "unbelievable stories" that "nobody would believe". (Tr. 200). According to Swiderski, on a few of these occasions Davis supplied him with marijuana. (Tr. 200).

Davis allegedly first offered cocaine to Swiderski at the end of 1973 or beginning of 1974, at which time Swiderski declined to buy any. (Tr. 202). Although he was afraid of Davis, Swiderski continued to meet with him thereafter and "turned on" with cocaine furnished by Davis on several occasions. (Tr. 202-03). Swiderski also strongly disapproved of Davis' morals owing to Davis' "association" in March, 1975 with a 17 year old young woman. Nevertheless, Swiderski snorted cocaine

on that day in an apartment where this girl was present. (Tr. 204-05).

On May 31, 1975, which was Swiderski's birthday, Davis called him at home and offered to turn him on to some marijuana. (Tr. 207). Despite his fear of Davis, Swiderski went to meet Davis at his room in the Hotel Chelsea. (Tr. 206-08). After trying the marijuana, Swiderski declined to purchase any but waited around for someone to arrive with cocaine which Davis had offered to Swiderski as a birthday present. (Tr. 208-09). When none was forthcoming, Swiderski sampled some speed. (Tr. 209-10). Swiderski refused to take a large quantity of the speed but did purchase $65 worth. (Tr. 211-12). Ms. De Los Santos then called Davis' room to find out what was delaying Swiderski with "this character" Davis on Swiderski's birthday. (Tr. 212).

Swiderski testified further that he didn't speak with Davis on either June 1 or 2, 1975 because both he and De Los Santos were busy attending the National Boutique Show where they were familiarizing themselves with different lines of clothing to order for their boutique. (Tr. 212-15). Swiderski claimed that on June 3, 1975 he was planning to purchase some clothes for his personal wardrobe and Ms. De Los Santos was going to purchase several thousand dollars worth of stock for the store. (Tr. 216-17). According to Swiderski, early that morning Davis had called and informed him in a "fantastic speech" that Davis was able to obtain some cocaine. (Tr. 217-18). The story was "unbelievable" and a "fantastic scheme" and, accordingly, Swiderski hung up the phone and went back to sleep because "that is what I thought of his scheme." (Tr. 218-19). About an hour later Davis called again and told Swiderski he had some friends who would "turn on" Swiderski at a party "being that [Swiderski] was going to New York anyway". Swiderski agreed to see Davis *alone*. (Tr. 219).

Later that afternoon Swiderski arrived *with Ms. De Los Santos* at the Hotel Chelsea, at which time Davis allegedly told them the party was somewhere else. (Tr. 220-21). Despite having to purchase merchandise at the Boutique Show, sometime after 3 P.M. Swiderski and De Los Santos, in the company of Davis and a young Black male who was known to Davis, went to an apartment building located on West 48th Street. (Tr. 222-24). After "hesitating" outside the building, Swiderski and De Los Santos "hesitatingly" went into this "creepy looking" tenement-type of building. (Tr. 224-25). Swiderski went because his "nose" would tell him the quality of the cocaine. (Tr. 225). Upon entering the apartment they met two unknown Blacks, and Swiderski was introduced to C.B. (Carlton Bush). (Tr. 226-27). Swiderski went to a small room with C.B. and Davis where he saw a mirror with some white powder on it. (Tr. 227-28). De Los Santos was then called into the room by Swiderski because he was "concerned" and wanted her "to be with me." (Tr. 228).

Following Davis' instruction, Swiderski tasted and snorted some cocaine. (Tr. 229). De Los Santos snorted some of the cocaine at least twice. (Tr. 229). After a short period while they "were hanging around waiting for some results to happen," Davis became excited. (Tr. 230). Swiderski and De Los Santos then agreed with each other that they would buy a gram of the coke, but Davis supposedly replied that they must purchase the whole package. (Tr. 230). As a result of the "stimulus" initiated by Davis, people came from the other room and asked "what's all the excitement?" (Tr. 230-31). According to Swiderski, Marty Davis was "bringing all this excitement, he was doing all this yelling, he was getting everybody up on nerves." (Tr. 230-31).

Swiderski asked Davis "how much is it going to cost me to get out of here", and an unknown man exchanged glances with Davis and answered "$1,250." (Tr. 231).

Swiderski asked De Los Santos for the money because he was afraid "they were going to beat us up," everybody getting excited, "everybody's minds wandering;" "I [Swiderski] had listened to some of his [Davis'] outrageous stories in the past." (Tr. 231). Swiderski gave $1,250 to a Black person, he and his fiancee were told they could go, and somehow the package of cocaine was dropped into Ms. De Los Santos' handbag by an unknown male. (Tr. 231-33). Swiderski and De Los Santos then drove Davis back in their van to the Chelsea Hotel. (Tr. 233).

After dropping Davis off at the Chelsea, the van was stopped at 34th Street and 8th Avenue by two cars whose occupants surrounded the van with drawn guns. (Tr. 234-36). Ms. De Los Santos began to scream and Mr. Swiderski "backed up carefully so as not to hit anybody," attempting to get around the blocking cars. (Tr. 236). After several attempts to execute this maneuver "carefully" and "yelling out the window for a cop," one of the men showed a badge at the side of the truck. The other men didn't display identification except for "a .357 Magnum which any gunman in New York would own." (Tr. 237).

Swiderski denied ever selling or offering to sell drugs to Davis, or of intending to distribute the cocaine obtained on June 3, 1975. (Tr. 238-39).

On cross-examination by counsel for co-defendant De Los Santos, Swiderski testified that during the two years of his acquaintance with her Swiderski never knew De Los Santos to sell or purchase drugs. (Tr. 241-42). While he was counting the $1,250 to pay for the cocaine, Swiderski saw an unknown male's arm place the "package" in De Los Santos' handbag. (Tr. 247).

On cross-examination by Government counsel, Swiderski acknowledged that $5,000 was a large sum of

money to take to a strange apartment building to which he was led "by the nose." (Tr. 248-49). He went there even though Davis had told him "unbelievable" stories over the preceding two years. (Tr. 250). Despite these wild stories, he and his fiancee had allowed themselves to be "turned on to cocaine" by Davis. Likewise, although he disapproved of Davis' personal life, he introduced his fiancee to Davis. (Tr. 250-58). Swiderski also indicated that he "turned on" to grass on a regular basis, smoked from "six to ten joints a day" and was aware of the intricacies of rolling marijuana. (Tr. 264-67).

Concerning the events of June 3, he testified that after leaving the apartment he never asked his fiancee what had been put into her handbag and had "no idea" how the cocaine found its way from her handbag into a separate leather pouch within the handbag containing over $4,000. (Tr. 268-69).* Swiderski similarly had "no idea" why cocaine had been placed in Ms. De Los Santos' bag; he was emphatic that there was no possible connection between the payment of $1,250 and the package being placed in the bag. (Tr. 269-70). During the return journey to the Chelsea Hotel he said nothing to Davis about what had occurred in the West 48th Street apartment. (Tr. 271).

Maritza De Los Santos

Ms. De Los Santos, a 25 year old graduate of Marymount College and owner of the Isle of View Boutique (Tr. 282-84), admitted to being an occasional user of cocaine and a one or two joints per week marijuana user

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* On recross by counsel for De Los Santos, Swiderski indicated that the leather pouch in question was a sheathing for an instrument used to test the amperage in electric cable. He further explained that the tester was used by him on occasion in his contracting work. (Tr. 279-80).

since 1972. (Tr. 285-86; 306). Both she and Swiderski turned on to grass. (Tr. 305-06).

She and Swiderski left their apartment in New Jersey on June 3, 1975 with more than $5,000 in cash contained in a black pouch and some marijuana to smoke at the Boutique Show. (Tr. 287-89). Ostensibly the money was for cash and carry purchases at the show. (Tr. 286-87).

At the Chelsea Hotel she and Swiderski met Davis and another person. After inquiry by Swiderski as to where they were going, all four got in the van and drove to a building on 48th Street, where they went up to a small apartment. (Tr. 290-91). Davis, Swiderski and the other person went into a small room. She remained in a different room containing a musical synthesizer. Shortly afterwards she was summoned into the other room by Swiderski where she snorted some coke and agreed to "take" a gram. (Tr. 292-93). Davis allegedly said repeatedly: "You have got to take the whole thing." (Tr. 293). Then other men entered the room. (Tr. 297). Swiderski asked an unknown male how much it would take to get out of the apartment and the unknown male asked for $1,250. (Tr. 294; 296-97). De Los Santos gave her handbag or the black pouch to Swiderski who counted out the proper amount of money and gave it to "someone." (Tr. 297-98).

Ms. De Los Santos testified on cross-examination by her co-defendant's counsel to some of the same events concerning the stopping of the van and subsequent arrest as had Swiderski. (Tr. 301-03).

On cross-examination by the Government, De Los Santos testified that although she did not know how the cocaine got into the pouch in her pocketbook, she hypothesized that it was probably placed there by an "unknown gentleman" in the "seedy" apartment. (Tr. 304-05). Her sole reason for going to 48th Street with $5,000 cash was

to get high and she did so only after being assured everything was alright. (Tr. 211-14). She admitted that she did not look into the pouch or bag on her way from the Chelsea Hotel to the Boutique Show. (Tr. 315-16).

The jury deliberated less than one hour.

ARGUMENT

POINT I

The trial court's instructions to the jury were correct.

The bulk of the arguments now advanced by the defendants relate to the trial court's instructions to the jury. De Los Santos complains solely of the failure of the Court below to instruct the jury on the unsupported theories of coercion and entrapment as defenses to the charges against her. Swiderski argues that the District Court erred by omitting from its charge a special instruction on informant credibility and a statement concerning the origin (or more accurately, non-origin) of threats against the informant, and by instructing the jury improperly on the elements of his entrapment defense. None of these arguments—taken singly or together—has merit. The jury was fully and fairly instructed on the case as a whole and neither the omissions from the charge assigned as error or the charge as given deprived the defendants of a fair trial.

A. The Court was not required to instruct the jury to scrutinize the informant's testimony with special care.

Appellant Swiderski contends that his conviction must be reversed because Judge Bonsal failed to grant his request that the jury be charged as a matter of law that

"[t]he testimony of an informer who provides evidence against a defendant for pay . . . must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" and that "[t]he jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant." (App. D).* This claim is entirely without merit.

In its seminal opinion in *United States* v. *Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933), this Court held that cautioning a jury particularly to scrutinize the testimony of an accomplice or informer** is never an absolute necessity and that the question of whether or not such instruction is given "is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary." The *Becker* rule has been applied and reaffirmed time and again in the ensuing four decades. *See, e.g., United States* v. *Wilson*, 154 F.2d 802, 805 (2d Cir.), *judgment vacated*, 328 U.S. 823 (1946); *United States* v. *Dennis*, 183 F.2d 201, 225 (2d Cir. 1950), *aff'd*, 341 U.S. 495 (1951); *United States* v. *Pagano*, 207 F.2d 884, 885 (2d Cir. 1953); *United States* v. *Parker*, 217 F.2d 672, 673 (2d Cir. 1954), *cert. denied*, 349 U.S. 959 (1955); *United States* v. *Cianchetti*, 315 F.2d 584, 592 (2d Cir. 1963); *United States* v. *Henry*, 417 F.2d 267,

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* The request was drawn verbatim from DEVITT & BLACKMAR, *Federal Jury Practice and Instructions* § 12.02 (1970).

** The Government submits that there is no logical basis for distinguishing between a so-called *accomplice* charge and one concerning *informant* testimony. "The purpose of giving the instruction in both instances is to inform the jury of the witness' self-interest and therefore the possibility of fabrication." *United States* v. *Gonzalez*, 491 F.2d 1202, 1207 (5th Cir. 1974). *See also United States* v. *Lee*, 506 F.2d 111, 121 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975); *Joseph* v. *United States*, 286 F.2d 468, 469 (5th Cir. 1960). Indeed, in its decision in *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), a case which involved both accomplice and informer testimony, this Court drew no distinction between these two types of cautionary instruction.

272 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970); *United States* v. *Abrams*, 427 F.2d 86, 90-91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); *United States* v. *LaSorsa*, 480 F.2d 522, 527 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Santana*, 503 F.2d 710, 715-16 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974). Thus, failure to specifically so caution the jury is not error, and warrants reversal of a conviction only if upon consideration of all the circumstances of the case the reviewing court concludes that the defendant suffered substantial prejudice. *United States* v. *LaSorsa*, *supra*; *United States* v. *Abrams*, *supra*; *United States* v. *Cianchetti*, *supra*. There is no such prejudice here.

"Substantial prejudice" to the defendant's right to a fair trial does not result where there is corroboration of the informant/accomplice (*United States* v. *Henry*, *supra*; *United States* v. *Cianchetti*, *supra*), where the defense counsel has full opportunity on cross-examination to explore the witness' motive to lie and interest in the outcome of the case and to argue these matters to the jury in summation (*United States* v. *Santana*, *supra*; *United States* v. *LaSorsa*, *supra*; *United States* v. *Cianchetti*, *supra*) and where the trial court's general instructions concerning credibility and impeachment of witnesses are adequate. (*United States* v. *Santana*, *supra*; *United States* v. *LaSorsa*, *supra*; *United States* v. *Abrams*, *supra*; *United States* v. *Henry*, *supra*; *United States* v. *Cianchetti*, *supra*; *United States* v. *Parker*, *supra*; *United States* v. *Pagano*, *supra*).

In this case there was substantial corroboration of Martin Davis' testimony in several material respects.

His testimony concerning the narcotics transaction which was the subject of Count One of the indictment was corroborated by the incriminating discovery of cocaine in defendants' joint possession, the large amounts of cash

seized from them upon their arrest, the observations of the surveillance officers and the circumstance of attempted flight (confirmed by photographs of damage to the law enforcement vehicles) when the van was stopped by the police. In addition, both Swiderski and De Los Santos took the witness stand and admitted to knowing Davis and to using narcotics. To the extent rejected by the jury as incredible, the defendants' "innocent" explanations for the presence of one ounce of cocaine and more than $5,000 in cash in their possession reinforced Davis' testimony.*

Significantly, neither defendant claims that Judge Bonsal curtailed cross-examination of Davis in any respect. *Compare United States* v. *Masino, supra.* Counsel were allowed full rein in questioning Davis about his prior misconduct, his interest in the case and possible motives for testifying falsely. Moreover, the trial judge urged counsel to address the issue of Davis' credibility in summation. (Tr. 337-38). Accordingly, Davis' credibility and his character vis-a-vis the character of defendants was vigorously and prominently presented to the

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* In this connection the Court of Appeals for the District of Columbia Circuit recently observed:

> "The extent of corroborative evidence required to alleviate the need for a cautionary instruction cannot be measured with mathematical precision.
>
> It is enough if there is evidence that confirms material points of an accomplice's tale, and confirms the defendant's identity and some relationship to the situation. The corroborative evidence need not resolve the conflicts between the accomplice's testimony and an exculpatory version of the sequence of events. . . . Corroboration need only provide independent evidentiary support for the witness' account; it need not resolve conflicts between that account and the defendant's version of the events. Otherwise, the more fantastic the defendant's story, the harder it would be to secure this type of 'corroboration.'" *United States* v. *Lee, supra,* 506 F.2d at 120-21, 125.

jury in the defense summations. (Tr. 375-76; 378-79; 381-82; 403-11). Government counsel also called these matters to the jury's attention both in opening (Tr. 14; 18-20) and summation (Tr. 359). *See United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).

Finally, Judge Bonsal properly informed the jury in his charge that they were the exclusive judges of credibility, that they were to subject the testimony of all witnesses, whether for the Government or the defense, to the same standards and that they should consider, among other things, a witness' possible bias in assessing credibility. (Tr. 439-42). Later, in response to a defense request, the Court supplemented its remarks on credibility by specifically directing the jurors' consideration to the interest which might have motivated the informant Davis:

> "Ladies and gentlemen, remember I told you you would consider the interest a person might have and I referred to the witnesses and to the defendants. But it occurred to me you might also think about whether Mr. Davis had an interest in testifying so I just add that to the others whose interest you might consider." (Tr. 447).

Considering the frequency and diversity with which the jury was admonished to view with a jaundiced eye Davis' testimony inculpating Swiderski and De Los Santos, it was not error—and certainly not prejudicial error —for the Court to have refused to give the defense-requested instruction on informant credibility. Viewed in the light of the totality of the circumstances, the issue of Davis' interest and motivation to testify falsely was "fairly put to the jury." *United States* v. *Santana*, *supra*, 503 F.2d at 716; *United States* v. *Blackwood*, *supra*, 456 F.2d at 531; *United States* v. *Mahler*, 363 F.2d 673, 677 (2d Cir. 1966). The law requires no more.

This conclusion is not altered in the slightest by the fact that Judge Bonsal also charged the jury that Swiderski and De Los Santos had "an extremely important interest here in testifying and that is a factor, their interest you may consider." (Tr. 441). Neither defendant objected to the "defendants' interest" instruction, *see United States* v. *Frank*, 525 F.2d 703, 706 (2d Cir. 1975); *United States* v. *Projansky*, 465 F.2d 123, 135 (2d Cir. 1972), *cert. denied*, 409 U.S. 1006 (1973); FED. R. CRIM. P. 30, and the Court took care to point out that a defendant's interest was not "incompatible with a defendant's capability of telling the truth." *United States* v. *Frank*, *supra*. Moreover, any claimed imbalance in the trial court's treatment of defendants' credibility as witnesses, on the one hand, and that of informant Davis, on the other, was wholly erased by Judge Bonsal's supplementary specific admonition to the jurors that they should "think about whether Mr. Davis had an interest in testifying." (Tr. 447).

Thus, "[a]dequate instructions on credibility were given," and it was not "reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury." *United States* v. *Thomas*, 484 F.2d 909, 912 (6th Cir.), *cert. denied*, 415 U.S. 924 (1973). *See United States* v. *Santana*, *supra*, 503 F.2d at 715-16; *United States* v. *Frank*, *supra*, 494 F.2d at 160-61; *United States* v. *LaSorsa*, *supra*, 480 F.2d at 527-28; *United States* v. *Blackwood*, *supra*, 456 F.2d at 530-31; *United States* v. *Cianchetti*, *supra*, 315 F.2d at 592.* Here, in light of all the matters before the

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* The proposition that it is not reversible error to fail to charge on specific interest or possible motivation to lie of a particular witness or class of witness if adequate general credibility and related instructions are given has been widely endorsed among the Circuits. *See, e.g., Joseph* v. *United States*, *supra* (5th Cir.); *United States* v. *Thomas*, *supra* (6th Cir.); *United*

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jury, it was hardly prejudicial error to deny the defendant's request for special emphasis on Davis' credibility.

B. The trial court's instructions on entrapment were proper.

Swiderski next complains that the trial court's charge on entrapment substantially prejudiced his defense because the jury was in effect told that the defendant bore the burden of establishing the elements of entrapment, and of doing so by proof beyond a reasonable doubt. Of course, had the trial court actually charged the jury in the fashion which Swiderski syllogistically proclaims, this no doubt would have been error. *See United States* v. *Rosner*, 485 F.2d 1213, 1221-22 (2d Cir.), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Braver*, 450 F.2d 799, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States* v. *Greenberg*, 444 F.2d 369, 371-72 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Berger*, 433 F.2d 680, 684 (2d Cir.), *cert. denied*, 401 U.S. 967 (1971); *United States* v. *Riley*, 363 F.2d 955, 958 (2d Cir. 1966); *United States* v. *Smalls*, 363 F.2d 417, 419 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967). But taken as a whole, Judge Bonsal's charge on entrapment correctly enunciated for the jury the bifurcated inducement-predisposition analysis it was required to undertake and properly assigned the burden of proof

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States v. *Ball*, 344 F.2d 925 (6th Cir. 1965); *United States* v. *Pritchard*, 458 F.2d 1036, 1040 (7th Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Coduto*, 284 F.2d 464, 469 (7th Cir. 1961); *United States* v. *Riddick*, 519 F.2d 645, 648 (8th Cir. 1975); *Hisaji Watada* v. *United States*, 301 F.2d 869, 870 (9th Cir. 1962); *Chargois* v. *United States*, 267 F.2d 410, 412 (9th Cir. 1959); *United States* v. *Holmes*, 453 F.2d 950, 952 (10th Cir. 1972); *Todd* v. *United States*, 345 F.2d 299, 301 (10th Cir. 1965); *United States* v. *Lee*, *supra* (D.C. Cir.).

on this matter to the prosecution. Thus, there was no error.

The law in this Circuit is clear that if there is sufficient evidence of initiation or inducement by a Government agent, the Government has the burden of proving that the defendant had a predisposition to commit the crime. *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (Hand, *J.*); *United States* v. *Riley*, *supra*. The burden to show inducement lies with the defense. Only then must the Government prove predisposition beyond a reasonable doubt. *United States* v. *Sherman*, *supra*, 200 F.2d at 882-83.

In this case Judge Bonsal gave the following instruction on entrapment:

> "Now, the defense of entrapment is available to Mr. Swiderski if you find that he was induced or enticed to commit the crime here which he would not otherwise have committed.
>
> If Davis' role was to afford Swiderski the opportunity to buy cocaine, that is not entrapment. Here Swiderski must establish that the idea of purchasing the cocaine originated with Davis and not with him.
>
> He must show that he had no previous disposition, intent or purpose to possess or to distribute the cocaine; that it was Davis that implanted in his mind, as an innocent person, the disposition to commit the crime of purchasing the cocaine.
>
> * * * * *
>
> And after you have considered this evidence determine whether the defendant Swiderski has established here that he would not have purchased the cocaine on June 3 except for Davis' enticements, inducements, or blandishments, if you will,

> and if you find that Swiderski has shown that, ladies and gentlemen, then the Government in addition to the elements I reviewed with you a minute ago must prove beyond a reasonable doubt that the defendant Swiderski was ready and willing to make the purchase on June 3 and that Davis merely afforded him the opportunity to do so. And if you find that the Government has not proved this beyond a reasonable doubt, then you would find the defendant Swiderski not guilty.
>
> But, on the other hand, if you find that the Government has proved beyond a reasonable doubt that Swiderski did knowingly, wilfully and unlawfully purchase the cocaine and that Davis merely gave him the opportunity to do it, then you may find the defendant guilty." (Tr. 433-34).

This instruction as a whole constituted a proper charge on the defense of entrapment. Yet, Swiderski argues that the use of the terms "show" and "establish" with respect to his obligation of proof created a burden much higher than that required of him. In this connection, Swiderski attaches undue significance to the District Court's choice of language. While these words might not have been the language of the defendants', the Government's or even this Court's choice (*see United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir., January 12, 1976) slip op. 6577, 6584), when placed in proper context they were not prejudicially erroneous. The sentences in which the offending words appeared must "be taken in connection with what preceded . . . and also with what followed." *Boyd* v. *United States*, 271 U.S. 104, 107 (1926).

Likewise, while we acknowledge that the defendant is not required to "show he had no previous disposition, intent or purpose . . .", as Judge Bonsal charged, the instructions must be examined as a whole. *Cupp* v.

Naughten, 414 U.S. 141, 146-47 (1973); *Boyd* v. *United States*, *supra*, 271 U.S. at 107; *United States* v. *Santiago*, *supra*; *United States* v. *Finkelstein*, Dkt. No. 75-1154 (2d Cir., December 1, 1975) slip op. 841, 847; *United States* v. *Wolfish*, 525 F.2d 457, 460 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974); *United States* v. *Malizia*, 503 F.2d 578, 583 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *United States* v. *Birnbaum*, 373 F.2d 250, 257 (2d Cir. 1967); *United States* v. *Hernandez*, 361 F.2d 446, 447 (2d Cir. 1966); *United States* v. *Nadler*, 353 F.2d 570, 573 (2d Cir. 1965). The purpose of this rule is to insure that "the impression . . . receive[d] from the printed words will be that which the jury has received from the spoken words." *United States* v. *Nadler*, *supra*. Here, the Government submits, the overall impact upon the jurors of Judge Bonsal's instructions concerning entrapment was an appreciation that in order to convict, if they found that Swiderski had shown that he was induced by Davis to possess the cocaine, then the Government was required to prove beyond a reasonable doubt that Swiderski was predisposed to commit the offense and merely awaiting favorable opportunity to do so.

It is clear from the concluding portion of the entrapment instructions that the only references to evidentiary burdens in the charge had to do with the Government's ultimate obligation of proving beyond a reasonable doubt that Swiderski committed the offense and had not been entrapped. In view of the Court's statements to that effect, the preceding phrases employing the words "shown" or "established" cannot fairly be interpreted to place any burden on the defense.* *United States* v. *Gardner*, 516

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* While ingenious, Swiderski's argument (Swid. Br. 30) that "[t]he jury may well have believed that appellant's burden to establish Government inducement meant that he must 'establish' it beyond a reasonable doubt" is nonetheless unavailing. A basic

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F.2d 334, 348 (7th Cir.), *cert. denied*, 96 S.Ct. 118 (1975). Furthermore, the jury was also generally instructed that the burden of proof that is on the Government never shifts through the trial and that the "presumption of innocence remains with each of the defendants throughout the trial and applies to the consideration of each of the essential elements of the crimes charged." (Tr. 422). Thus, the instructions, taken on the whole, neither misled the jury nor misplaced the burden. *United States* v. *Gardner*, *supra*; *United States* v. *Eddings*, 478 F.2d 67, 72-73 (6th Cir. 1973); *Martinez* v. *United States*, 373 F.2d 810, 812-13 (10th Cir. 1967).

C. The trial court properly refused to charge on entrapment as to the defendant De Los Santos.

Marita De Los Santos asserts that it was error for Judge Bonsal to refuse a request to instruct the jury to consider the defense of entrapment both as to her and co-defendant Swiderski. This assertion, not the Court's refusal to so charge, is erroneous.* The evidence at trial simply did not warrant submitting the case against De Los Santos to the jury on a theory of entrapment.

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premise of this argument is that "the reasonable doubt standard *pertaining to the Government* was the only one articulated in the Court's charge." Swid. Br. 30 (emphasis supplied). But if the reasonable doubt standard was particularly identified with the burden to be borne by the Government, then the omission of the modifier "beyond a reasonable doubt" as to the supposed burden to be carried by the defense necessarily must have implied to the jury that the defense's obligation could be satisfied by a lesser quantum of proof.

* Although counsel orally requested the jury be charged on entrapment for both defendants (Tr. 342), after the charge was delivered no exception was taken to the Court's failure to direct that the jury consider entrapment as to De Los Santos. No doubt this is explained by inclusion in the charge of admonition that De Los Santos' mere presence at the apartment when the cocaine was obtained or her acquiescence in Swiderski's conduct there were insufficient to convict. (Tr. 431).

At the time the parties' Requests to Charge were being reviewed, De Los Santos' counsel opined that both his client and Swiderski were relying "in part on entrapment." (Tr. 342). However, when Judge Bonsal remarked that although there was evidence that Swiderski had been opportuned, the evidence as to De Los Santos showed that "all she was doing was she was along with her financee, is that right?" counsel replied, "Essentially, your Honor." (Tr. 342). The Judge further illumined his hesitancy to charge on entrapment for De Los Santos, stating that "it seems to me there is no record here that Miss De Los Santos was having constant conversations with Davis and her willpower was being broken down by him." (Tr. 343). Counsel once again agreed that this was the case and that a defense of entrapment and his client's claim that "she was the financee and she was just around, [and] she didn't know anything about these things" were inconsistent. (Tr. 343). Judge Bonsal also explained to counsel that "whatever I charge . . . has to have some relation to the evidence" and the evidence on De Los Santos didn't fit entrapment. (Tr. 343-44). The matter was not further pursued.

This Court has repeatedly suggested that a defendant who asserts inconsistent defenses—such as a denial of commission of the offense intoned in tandem with a claim of entrapment—is not entitled to an entrapment instruction. *See United States* v. *Alford*, 373 F.2d 508, 509 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); *United States* v. *Braver*, 450 F.2d 799, 802 n.7 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States* v. *Licursi*, Dkt. No. 75-1173 (2d Cir., November 11, 1975) slip op. 6449, 6459 n.5.* Here De Los Santos' defense was that she was completely unaware that any illegal transaction was

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* Other Circuits have ruled instruction on entrapment not in order in such circumstances. *See United States* v. *Bishop*, 367 F.2d 806, 809 n.4 (2d Cir. 1966).

going to occur at the West 48th Street apartment and that she simply had gone there in the "innocent" company of her finance. She could not alternatively rely on an inconsistent defense because "a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment." *Sylvia* v. *United States*, 312 F.2d 145, 147 (1st Cir.), *cert. denied*, 374 U.S. 809 (1963), citing *United States* v. *Di Donna*, 276 F.2d 956 (2d Cir. 1960). *See also, e.g., United States* v. *Pagano, supra*, 207 F.2d at 885; *United States* v. *Williamson*, 482 F.2d 508, 515 (5th Cir. 1973); *United States* v. *Rodriquez*, 498 F.2d 302, 311 (5th Cir. 1974); *United States* v. *Thompson*, 493 F.2d 305, 313 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Government of Virgin Islands* v. *Hernandez*, 508 F.2d 712, 717 n.5 (3d Cir. 1975).

De Los Santos urges further (Santos Br. 13) that she was entitled to an entrapment charge because the jury was instructed that she could be convicted if they found her to have aided and abetted a violation of the narcotics laws by Swiderski.* While it has been held in a related context that an aider and abettor must have the same knowledge and intent required of the principal (*United States* v. *Hernandez*, 290 F.2d 86, 89 (2d Cir. 1961)), contrary to counsel's suggestion (Santos Br. 13), it does not necessarily follow that "if the principal . . . was entrapped into the transaction, the defense must likewise inure to the aider and abettor." The umbrella of entrapment does not stretch that far. *See United States* v. *Azadian*, 436 F.2d 81, 82-83 (9th Cir. 1971); *Carbajal-Portillo* v. *United States*, 396 F.2d 944, 947-48 (9th Cir. 1968).

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* The evidence is also sufficient to sustain a conviction of De Los Santos as a principal. The cocaine was seized from her handbag and Davis testified that De Los Santos stated to Swiderski in the apartment that even though the cocaine "wasn't good enough for their personal use, . . . they had a buyer ready and could sell all that Carlton Bush could come up with." (Tr. 54).

The evidence in this case established that De Los Santos joined Swiderski for a cocaine party and that she did so knowingly. There simply is no evidence of inducement or lack of predisposition. In the absence of such evidence, De Los Santos may not avail herself of a defense which might be useful to her co-defendant. *United States* v. *Jenkins*, 470 F.2d 1061, 1063 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973). *Accord*, *United States* v. *Dodson*, 481 F.2d 656, 658 n.3 (5th Cir. 1973); *United States* v. *Gonzales*, 461 F.2d 1000, 1001 (9th Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Sanchez*, 440 F.2d 649, 650 (9th Cir. 1971). Thus, Judge Bonsal properly refused to submit to the jury an entrapment defense as to De Los Santos.

D. The trial court properly refused to instruct the jury concerning the absence of evidence that Swiderski or De Los Santos had threatened the informant.

As part of the blunderbuss attack which he mounts to the charge, Swiderski complains that the District Court committed reversible error by not advising the jury that the evidence failed to show that the informant Martin Davis had been threatened by either defendant. Although a threat was not an element of either of the crimes charged in the indictment, the issue arose at trial because Swiderski's counsel elicited testimony from Davis on cross-examination that after June 5, 1975 the nature of the compensation he had received from the DEA Task Force had changed. Instead of paying Davis in hand a fixed sum on a weekly retainer basis, DEA began paying for his room and board at an unnamed hotel to which he had been taken for his safety. (Tr. 103).

Swiderski's trial counsel accepted Davis' response as given. He did not request that the reference to the reason

for a change in the compensation arrangement with DEA be stricken as non-responsive, or on any other basis.* Counsel then proceeded with the remainder of his cross-examination of Davis. Swiderski's counsel belatedly (Tr. 152) requested a mistrial, but only after counsel for De Los Santos asked Davis whether there came "a point in time" at which "the Government" pick[ed] up your hotel bill" and Davis replied "Not at the Chelsea, but after they moved me from the Chelsea, because there may have been threats against me." (Tr. 115). His request was denied. In the interim, responding to implications in the defense cross-examination that the benefits received by Davis were gratuities designed to influence his testimony improperly, Government counsel on redirect attempted to ask whether Davis' life had been threatened during the period he was *de facto* in DEA protective custody at the hotel. Judge Bonsal sustained objection to this line of inquiry. (Tr. 131-32). On recross the Judge adhered to his ruling excluding all testimony on this subject. (Tr. 133).

In denying Swiderski's mistrial motion, Judge Bonsal expressed the view that the jury had not been left with the impression, as counsel for Swiderski believed, that any threats which had been made against Davis originated with defendants. He added that:

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* In an earlier exchange with Davis, Swiderski's counsel had elicited—and accepted as responsive to his question—the following:

> "Q. Can you tell us again how it came about that you started getting paid on this regular basis? What happened?
>
> A. Well, frankly I had not been too successful and it didn't seem to me that it was in my interest to continue. I would make a little money sometimes and by the time the next case would come around I had spent most of that money and it just seemed to me I was getting deeper and deeper into it and I felt I was making some very bad enemies, very dangerous people. . . ." (Tr. 82).

> ". . . I will straighten them out on that. If it doesn't happen before, I will straighten it out on the charge. I will tell them there is no evidence of any threats . . . [b]y these defendants." (Tr. 152-53).

The trial continued and by the end of the succeeding day all parties had rested.

Before denying a defense request that the jury be charged concerning absence of evidence that Swiderski or De Los Santos had threatened Davis, the trial court obtained a pledge from the prosecutor that the matter of threats would not be gone into on summation nor would there be reference to why Martin Davis "moved from the [Hotel] Chelsea to some other place." (Tr. 352-53). Shortly, thereafter, the Judge ruled:

> "I wouldn't like to have to even raise threats. I think the jury has forgotten all about it, really, and I don't see any point in raising it because every time you raise it you don't know what the reaction is to the jury. I would rather not raise it at all and I don't intend to raise it unless I see something in the summations which makes it necessary to do so. I think that's where I would like to leave that." (Tr. 354).

Accordingly, after the parties made no reference in summation to threats or the reasons for Davis' change of residence, the trial court declined to allude to these issues in its charge. The defendants' right to a fair trial was not prejudiced thereby.

From the foregoing, it is evident that the subject of threats was first raised by Swiderski's counsel and was later renewed by co-counsel. Only then did the prosecutor attempt to rebut the inference of impropriety in the Government's payment of Davis' hotel bill. Judge

Bonsal quickly halted any further references to the matter by all parties. Then, to fully insure that the potentially troublesome subject did not reappear in the case, he received assurances that the prosecution in summation would "let the sleeping dog lie." *See* Tr. 351-54. *Cf. United States* v. *Malizia*, 503 F.2d 578, 580-82 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975). Thus, it was eminently reasonable for the experienced trial judge who had presided over the case and seen the jury's reaction firsthand to conclude, as he did, that nothing additional had arisen in summation to warrant parading the threat issue before them yet another time.

Significantly, there was never a suggestion that the defendants had threatened Davis. Indeed, Davis testified that during his year and a half as a DEA informant he had worked on many cases, only one of which was that involving the defendants. Finally, the jury heard him explain *on cross-examination* that during his DEA work he was "making some very bad enemies, very dangerous people." (Tr. 82). Presumably, therefore, there would be many persons other than the defendants who might have desired to or actually did threaten Davis. *United States* v. *Burton*, 525 F.2d 17, 19 (2d Cir. 1975). At best, it is highly remote that the jury believed that the threats to Davis' safety—if the jury attached any significance whatsoever to the disjointed references in this connection —had originated with Swiderski or De Los Santos.

In the overall context of the trial, the "failure to include in the charge some sort of corrective language on the question of threats" (Tr. 446), a proposed form of which was never suggested by defense counsel, was not error.

E. The District Court's failure to instruct the jury on coercion was not error.

Maritza De Los Santos now claims—for the first time—that the omission from Judge Bonsal's charge of an instruction on the defense of coercion was error. However, the record plainly reveals that the District Court was never asked to charge on coercion by either defense counsel.* Nor, for that matter, was the issue addressed by defense counsel in summation. In fact, it was only tangentially alluded to during trial. For these reasons it was not error for the trial court to omit a reference to coercion in its charge, *United States* v. *Brettholz*, 485 F.2d 483, 490 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974), and counsel cannot now assign such omission from the charge as error. FED. R. CRIM. P. 30; *United States* v. *Barry*, 518 F.2d 342, 346 (2d Cir. 1975); *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). *Cf. United States* v. *DiFronzo*, 345 F.2d 383, 386-87 (7th Cir.), *cert. denied*, 382 U.S. 829 (1965).

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* The statement contained in the De Los Santos brief (p. 12) that her counsel "excepted to the Court's failure to charge on the issue of threats" and that such exception should "surely be construed as a request to charge on the defense of coercion" is, to say the least, confusing and illogical. It is manifest that the "threats" referred to by De Los Santos' counsel were those allegedly made *against* the informant by persons unnamed or unknown, not threats directed to appellants' *by* the informant or anyone else. Thus, if counsel had consulted the record on this point he would have seen that his exception was to "your Honor's failure to include in the charge some sort of *corrective* language on the question of threats." (Tr. 446) (emphasis added). Needless to say, whether or not in counsel's hindsight opinion "for all ostensible purposes [coercion] was the only cognizable defense available to the two defendants" (Santos Br. 12), it does not follow that an instruction on the affirmative defense of coercion was necessarily—or even possibly—embraced within a renewed request that the trial court tell the jury the defendants had not threatened the chief witness against them at trial.

Moreover, any request for a coercion instruction would have to have been rejected out of hand. Coercion of the type sufficient to excuse criminal conduct must be immediate and such as to induce a well-grounded apprehension of death or serious bodily injury and there may not be any reasonable opportunity to escape. *E.g.*, *Shannon* v. *United States*, 76 F.2d 490, 492-93 (10th Cir. 1935); *R. I. Recreational Center* v. *Aetna Casualty and Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *United States* v. *Di Fronzo*, *supra*. "Fear of harm to property is not enough." *United States* v. *Palmer*, 458 F.2d 663, 665 (9th Cir. 1972); *United States* v. *D'Aquino*, 192 F.2d 338, 357-58 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). There is no evidence of such coercion in this case. Suffice it to say that notwithstanding the "unbelievable," "fantastic" and "outrageous" stories with which De Los Santos and Swiderski claim Davis plied them (Tr. 231; 250), they voluntarily accompanied him to the West 48th Street apartment on June 3. Thereafter, despite the "excitement" and "stimulus" they say was brought on by Davis, they once more chauffeured him around Manhattan.* (Tr. 233; 311-12; 315-16). Without question, this voluntary act of driving Davis back to his hotel after "escaping" from the apartment—instead of reporting the events directly to the authorities—is sufficient proof that they had been knowing and willing participants in a narcotics transaction and not the victims of compulsion or duress which would excuse their criminal conduct. *Cf. United States* v. *Chapman*, 445 F.2d 746, 749-50 (5th Cir. 1972). A charge on this question was therefore not required in any event.

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* Curiously, neither Swiderski nor De Los Santos saw any connection between their payment of $1,250 and return receipt of the cocaine. (Tr. 268-70). Additionally, neither defendant questioned Davis about the events in the apartment as they gave him a ride back to the Chelsea Hotel. (Tr. 271).

POINT II

Judge Bonsal properly submitted to the jury the factually disputed issue of entrapment.

The jury having soundly rejected Swiderski's claim of entrapment, he now urges that the District Court committed error by allowing the jury to consider the matter at all because the Government's "creative activity" exceeded the bounds of fundamental fairness, thereby requiring a finding of entrapment "as a matter of law", and irrespective of the defendant's predisposition. This contention is frivolous.

The linchpin of Swiderski's argument appears to be that the particular cocaine which he was charged with possessing had been furnished to him by an individual (Carlton Bush) whom he met through informant Davis. Without Davis' role as intermediary between Bush, a willing seller of narcotics, and Swiderski, a willing purchaser, the argument continues, the June 3 transaction would not have occurred, Swiderski would have been cocaineless and no crime would have been committed. The evidence at trial, simple logic and well-established legal doctrine refute this claim.

Assuming *arguendo* that Swiderski met his burden on inducement, thereby requiring the Government to prove his predisposition to commit the crime charged, there clearly was sufficient credible evidence to establish that Swiderski previously had engaged in criminal conduct similar to the crime charged, had a design to commit the crime charged which antedated Davis' introduction of Swiderski to Bush, and was willing to commit the crime as evidenced by his preparations for the purchase prior to June 3. Accordingly, Judge Bonsal was not only warranted but required to submit the issue of entrapment to the jury.

In contrast to Swiderski's testimony as to the events of June 3 and his prior contacts with the informant, Davis testified, *inter alia*: (1) he had never sold or given Swiderski any drugs; (2) when he first met Swiderski, Swiderski said he was selling drugs and asked Davis to help in finding buyers; (3) Swiderski told him on May 31 that he was in the market for "a quarter of cocaine"; (4) Swiderski flashed a roll of bills when he met with Davis on May 31 and; (5) on June 2 Swiderski urged Davis to complete the deal quickly or Swiderski would have to make the purchase from one of his other cocaine connections. (Tr. 40-43; 47; 92-94). Clearly the matter of who was telling the truth, Davis or Swiderski, was for the jury to resolve.

Apparently recognizing the infirmity of his position in this respect, Swiderski characterizes this case as one where the conduct of the Government "cannot be countenanced no matter how guilty [the] defendant otherwise is." Swid. Br. 38. This characterization is based upon Davis' bringing together of Swiderski and Bush and of the additional circumstance that Davis was "paid by the Government for playing this role," payment being on what is misapprehended as "a contingent fee basis."* Swid. Br. 37. As support for this novel proposition, Swiderski relies primarily on two decisions of the Court of Appeals for the Fifth Circuit: *United States* v. *Bueno*, 447 F.2d 161 (5th Cir. 1971) and *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962).

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* While Davis was at first to receive $150 each time he introduced an undercover agent to a seller of heroin, cocaine or some other hard drug (Tr. 28-29; 80-81), when he participated in the events which are the subject of this prosecution his compensation arrangements had been altered so that he was receiving a straight weekly salary of $210. (Tr. 82-83). Although this salary was subject to review from month to month, Davis was not required to "make any cases" at all before—or after—receiving it. (Tr. 83-84).

Bueno holds that if the Government does not rebut a narcotics defendant's testimony that the narcotics were furnished to him by the Government informer, then as a matter of law the defendant cannot be convicted. In *Williamson*, the Court ruled that a defendant's conviction should not be allowed to stand where it was brought about through the efforts of an informer who had been hired by the Government to "get" evidence on named individuals for set bounties. Aside from the determinative circumstance that the factual settings which prompted the decisions in *Bueno* and *Williamson* are without parallel in the instant case*, the continuing vitality of *Bueno* is highly doubtful in light of the Supreme Court's decision in *United States* v. *Russell*, 411 U.S. 423 (1973) and this Court's decisions in *United States* v. *Rosner*, 485 F.2d 1213 (1973), *cert. denied*, 417 U.S. 950 (1974) and *United States* v. *Archer*, 486 F.2d 670 (1973); the precedential value of *Williamson* is similarly restricted under the decisions of this Circuit in *United States* v. *Smalls*, 363 F.2d 417 (1966), *cert. denied*, 385 U.S. 1027 (1967) and *United States* v. *Cuomo*, 479 F.2d 688, *cert. denied*, 414 U.S. 1002 (1973).

In *Russell*, the Supreme Court reversed a decision of the Court of Appeals for the Ninth Circuit which had, in Justice Rehnquist's words, "in effect expanded the traditional notion of entrapment . . . to mandate dismissal of a criminal prosecution whenever the court determines that there has been 'an intolerable degree of governmental participation in the criminal enterprise.'" 411 U.S. at

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* There is no evidence in this record that the cocaine was furnished to Swiderski by Davis. Davis merely furnished Swiderski with the opportunity to obtain cocaine from a fellow lawbreaker, Carlton Bush. Davis never touched the cocaine nor received any share of the proceeds from the sale. Similarly, Davis was not made an informer by DEA for the purpose of gathering evidence or securing a conviction against Swiderski, De Los Santos or any other particular individual.

427. The Ninth Circuit had there concluded that the supplying by an undercover agent to the defendants of a scarce ingredient essential for the manufacture of a controlled substance was "intolerable." Identifying the Fifth Circuit's decision in *Bueno* as a possible source of authority for the Ninth Circuit's ruling, Justice Rehnquist went on to explain that decisions such as *Bueno* which purported to find entrapment as a matter of law where there had been "overzealous law enforcement" were inconsistent with the relatively limited scope of that doctrine as recognized in the federal courts:

> "... [T]he defense of entrapment enunciated in those opinions [*Sorrells* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958)] was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Id.* at 435.

In *Archer*, this Court explained the *Russell* decision as but another in a long line of cases where the Supreme Court "has steadfastly refused to rule that governmental participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense." 486 F.2d at 675. It was also there pointed out that in the usual case where a federal undercover agent catalyzes a narcotics transaction, "the Government agents have actually not committed a crime at all since they have no criminal intent." *Id.* The *Archer* opinion then went on to note that the "usual" situation where sale of narcotics has been induced through the Government's efforts "in order to make drug arrests" was entirely tolerable. *Id.* at 677.

In his opinion for the Court in *Rosner*, Judge Gurfein rejected as untenable in light of *Russell* an assertion that a case of entrapment as a matter of law is made out whenever it can be shown that an agent of the Govern-

ment "supplied the means for the commission of the crime."* 485 F.2d at 1223.

As for Swiderski's proclamation (Swid. Br. 43) that "this Circuit has never expressly rejected the proposition that *Williamson* stands for," the following portions of Judge Waterman's opinion for the Court in *Cuomo* are dispositive here:

> "Defendants' reliance on the Fifth Circuit decision of Williamson v. United States, *supra*, in which a conviction was set aside because an unconscionable relationship existed between the Government and its informant, is clearly misplaced. As noted by our court in United States v. Smalls, *supra*, in *Williamson* there was a unique situation in which the evidence was clear that the Government agents offered a 'specific sum of money to convict a specified suspect.' . . . In this case Feinberg was employed by the BNDD to engage in narcotics transactions generally and not to deal with Cuomo and Rizzo, these defendants, specially.
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> * * * * *
>
> As a 'special employee' of the BNDD [Feinberg] was paid for whatever general information he might provide relative to dealers in hard narcotics and also for the help he might provide in preparing or attempting to prepare such cases for prosecution. . . . The use of this paid special employee does not, of itself, constitute entrapment, nor does it, in this case, 'shock the conscience of the court.'" 479 F.2d at 692 & n.2.

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* Swiderski's effort (Swid. Br. 42 n.) to distinguish this statement in *Rosner* from the holding in *Bueno* is singularly unpersuasive. Although all of the 3500 material which Leuci furnished to Rosner may not have been contraband *per se*, the transcripts of Grand Jury testimony certainly were. *See* FED. R. CRIM. P. 6(e).

Taken together, these authorities* manifest the flimsy foundation for any claim by Swiderski that he was entitled to a judgment of acquittal as a matter of law.

Furthermore, even if this Court were to rule that the *Bueno-Williamson* line of authority retains some measure of persuasiveness after *Russell*, the Government respectfully suggests that there is not present here egregious "conduct . . . fall[ing] below standards, to which common feelings respond, for the proper use of governmental power" sufficient to invoke the exercise of this Court's supervisory power or requisite to a finding that due process has been denied. *See Sherman* v. *United States*, 356 U.S. 369, 382 (1958) (Frankfurter, *J.*, concurring).

Unlike *Bueno*, this case does not take "on the element of the government buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime." 447 F.2d at 905. Whereas "such conduct

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* All but one of the other Courts of Appeals which have had occasion to consider the question have rejected a *Bueno* type rule, most often on the ground of its repugnancy with *Russell*. *See United States* v. *Jett*, 491 F.2d 1078, 1080 n.3 (1st Cir. 1974); *United States* v. *Eddings*, 478 F.2d 67, 71 (6th Cir. 1973); *United States* v. *McGrath*, 494 F.2d 562 (7th Cir. 1974); *United States* v. *Hampton*, 507 F.2d 832, 834-36 (8th Cir. 1974), *cert. granted*, 420 U.S. 1003 (1975); *United States* v. *Lue*, 498 F.2d 531, 532-35 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

Williamson has likewise been criticized widely. *See United States* v. *Jett*, *supra*, 491 F.2d at 1081; *United States* v. *Grimes*, 438 F.2d 391, 394-96 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971); *United States* v. *Gardner*, *supra*, 516 F.2d at 342-44; *United States* v. *Ladley*, 517 F.2d 1190, 1192-93 (9th Cir. 1975).

There are also indications that the Court which authorized *Bueno* is finding it ever more difficult to reconcile its decision there with *Russell*. *See United States* v. *Workopich*, 479 F.2d 1142, 1144-47 (5th Cir. 1973); *United States* v. *Register*, 496 F.2d 1072, 1081-82 (5th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); *United States* v. *Arias-Diaz*, 497 F.2d 165, 169 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

does not facilitate discovery or suppression of ongoing illicit traffic in drugs" and therefore may be said to serve "no justifying social objective" (*United States* v. *West*, 511 F.2d 1083, 1085 (3d Cir. 1975)), the resource and ingenuity of the drug enforcement authorities in this case led to an informant bringing together, under controlled circumstances, a narcotics supplier and a willing purchaser—the purchaser's clear intention being to redistribute the contraband—in order that both individuals might be apprehended and prosecuted,* and the narcotics withdrawn from circulation. As was observed in *Russell*:

> "In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation. . . . Law enforcement tactics such as this can hardly be said to violate 'fundamental fairness' or 'shocking to the universal sense of justice'. . . ." 411 U.S. at 432.

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* Carlton Bush was named as a defendant in Indictment 75 Cr. 796, filed the same day as the Indictment in this case. Bush is presently a fugitive from justice.

CONCLUSION

The judgments of conviction should be affirmed.

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★ U. S. Government Printing Office 1976— 614—350—618

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COUNTY OF NEW YORK) ss.:

IRA H. BLOCK, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of March, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

IRA H. BLOCK

Sworn to before me this

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